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9 Attorneys for Timothy H. Shaffer, Chapter 11 Trustee

10 **UNITED STATES BANKRUPTCY COURT**

11 **DISTRICT OF ARIZONA**

12 In re:

13 POTENTIAL DYNAMIX, LLC,

14 Debtor.

Case No. 2:11-bk-28944-DPC

CHAPTER 11

**APPLICATION TO EMPLOY NESS
CONSULTING LLC AS CONSULTING
EXPERT**

15 Timothy H. Shaffer, the Chapter 11 Trustee (the "**Trustee**"), has retained Schian Walker, P.L.C.
16 (the "**Firm**") to represent him in the matter of *Timothy Shaffer v. Amazon Services LLC*, Adv. No. 2:13-
17 ap-00799 (the "**Adversary Proceeding**"). To prosecute the Adversary Proceeding, the Firm desires to
18 retain Ness Consulting LLC ("**Ness**") to serve as its consulting expert under Federal Rule of Civil
19 Procedure 26(b)(4)(D). Because the Firm is retaining Ness, and because Ness will not be involved in
20 the administration of the bankruptcy estate, Bankruptcy Code §§ 327 and 328(a) likely do not apply to
21 require the filing of this Application. Consequently, the Application is being filed as a precautionary
22 matter only. This Application is supported by the attached Memorandum of Points and Authorities, the
23 *Verified Statement of Catherine M. Cameron on Behalf of Ness Consulting LLC Pursuant to Bankruptcy*
24 *Rule 2014* attached hereto as Exhibit "A" and the entire relevant record in this case.

25 DATED this 19th day of August, 2015.

26 SCHIAN WALKER, P.L.C.

By /s/ SCOTT R. GOLDBERG, #015082

Dale C. Schian

Scott R. Goldberg

Attorneys for the Trustee

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 1. Among other things, the Adversary Proceeding concerns allegations that Amazon
3 Services LLC ("**Amazon**") has failed to account for inventory that the above-captioned debtor
4 ("**Debtor**") shipped to Amazon under the Fulfilment By Amazon ("**FBA**") program.

5 2. Amazon prepares many reports ("**Reports**") for sellers that participate in the FBA
6 program that contain data that only Amazon possesses. Ness will assist the Firm in evaluating the
7 Reports and their underlying data.

8 3. In many instances in the Adversary Proceeding, Amazon used non-FBA data and
9 software tools to conduct its own "deep dive" investigations. Amazon's investigations repeatedly have
10 produced unreliable results. Ness will assist the Firm in evaluating Amazon's own investigations and
11 the results thereof.

12 4. In the Adversary Proceeding, Amazon has responded to the Trustee's discovery requests
13 by producing data without aggregating it, explaining it, and without providing a data dictionary to
14 enable the Trustee to interpret it. Ness will assist the Firm in evaluating the data that Amazon has
15 produced.

16 5. Ness is being retained as a consulting expert to the Firm under Federal Rule of Civil
17 Procedure 26(b)(4)(D). Moreover, Ness will not be involved in the administration of the bankruptcy
18 estate. Under these facts, it is not likely that Code §§ 327 and 328 apply to require the filing of this
19 Application. *See In re Napoleon*, 233 B.R. 910 (Bankr D. N.J. 1999). The Application, therefore, is
20 being filed as a precautionary matter. Any change in Ness' status will be promptly brought to the Court's
21 attention through the filing of an amendment to this Application.

22 6. Ness will not seek payment from the bankruptcy estate directly. Instead, the fees and
23 expenses that Ness incurs will be included in the expenses that the Firm will incur, and on account of
24 which the Firm will seek reimbursement from the bankruptcy estate. However, any change related to
25 the foregoing will be promptly brought to the Court's attention through the filing of an amendment to
26 this Application.

7. As set forth in the Bankruptcy Rule 2014 statement attached hereto as Exhibit "A," Ness has no connections to the Debtor, its creditors or to the United States Trustee.

8. Ness is a disinterested party related to the matters in which it is to be retained.

9. Notice of this Application has been provided to Amazon, the Official Committee of Unsecured Creditors, the Debtor, the Office of the United States Trustee, and any party that has requested notice.

DATED this 19th day of August, 2015.

SCHIAN WALKER, P.L.C.

By /s/ SCOTT R. GOLDBERG, #015082

Dale C. Schian
Scott R. Goldberg
Attorneys for the Trustee

COPY of the foregoing
e-mailed this 19th day
of August, 2015, to:

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/s/ DEBBI STEPHENS

EXHIBIT "A"

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CHAPTER 11

**VERIFIED STATEMENT OF CATHERINE
M. CAMERON ON BEHALF OF NESS
CONSULTING LLC PURSUANT TO
BANKRUPTCY RULE 2014**

15 Catherine M. Cameron, being first duly sworn upon her oath, deposes and states:

16 1. I make this declaration based upon my personal knowledge in support of the *Application*
17 *to Employ Ness Consulting LLC as Consulting Expert* (the "**Application**").

18 2. I am the managing member of Ness Consulting LLC ("**Ness**") located at 261 East Vinedo
19 Lane in Tempe, Arizona 85284.

20 3. Ness is a full service consulting firm with broad experience providing damage
21 calculations, forensic analysis, and management consulting services to clients in a wide range of
22 industries. Also, Ness is an expert in inventory accounting and inventory reconciliation matters.

23 4. Ness and its employees are duly qualified to perform all functions that are required in
24 relation to their proposed employment as consulting expert to Schian Walker, P.L.C. (the "**Firm**") as
25 counsel to Timothy H. Shaffer, the Chapter 11 Trustee (the "**Trustee**").

26 5. I am familiar with the claims that the Trustee has asserted against Amazon Services LLC
("**Amazon**") in the matter of *Timothy Shaffer v. Amazon Services LLC*, Adv. No. 2:13-ap-00799 (the
"**Adversary Proceeding**").

1 6. As set forth in the Application, Ness has agreed to provide assistance to the Firm in
2 evaluating the inventory claims that have been asserted in the Adversary Proceeding against Amazon.

3 7. Ness will also perform any other consulting services as directed by the Firm and may
4 provide expert testimony as needed. Ness will also evaluate discovery data that Amazon has produced.

5 8. The services that Ness will provide will complement the services that Ashworth
6 Consulting, LLC will provide to the Firm. The expertise of Ashworth Consulting, LLC is in the areas of
7 data base management, and administration and related technologies. The expertise that Ness has in in
8 the area of inventory management, accounting, and reconciliation.

9 9. Ness will charge for its services on an hourly basis in accordance with its standard hourly
10 rates in effect on the date that services are rendered.

11 10. The current hourly rate is \$280 per hour, and administrative staff is charged at between
12 \$60 - \$150 per hour. The minimum daily rate for any required testimony is \$1,000. Ness will maintain
13 detailed records of any actual and necessary costs incurred in connection with the aforementioned
14 services.

15 11. The fees and expenses that Ness incurs will be part of the expenses that the Firm will
16 incur in prosecuting the Adversary Proceeding, and on account of which the Firm will seek
17 reimbursement under Code § 327 and Rules 2014 and 2016.

18 12. Consequently, Ness will be paid from the bankruptcy estate indirectly from the Firm's
19 reimbursed expenses.


20 13. Based on my investigation to date, neither Ness nor any of its directors or associates has
21 any interest that is adverse to the interests of the Debtor or its estate.

22 14. Based upon my investigation to date, neither Ness nor any of its directors or associates
23 has a connection or relationship to the Debtor's creditors, to the United States Trustee or to any other
24 interest party in this case.

25 15. Ness has not entered into any arrangement to share any compensation that may be
26 awarded by the Court, except as permitted under Bankruptcy Code § 504(b).

1 I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and
2 correct to the best of my knowledge, information and belief.

3 DATED: August 18, 2015.

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